No. 15502

United States Court of Appeals

FOR THE NINTH CIRCUIT

MOE WEISE AND JAMES LESTER FRENCH,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

On February 6, 1957, the appellants were convicted and sentenced on two counts of the indictment charging them with transporting obscene materials between Portland, Oregon and Tacoma, Washington, in violation of 18 U.S.C. 1465.

In this appeal from that conviction the appellants contend that photographs, films and physical evidence admitted during the trial should have been suppressed as having been seized incident to an unlawful arrest. These items of evidence were removed from the car driven by the appellants at the time of their arrest in Tacoma, Washington, on March 17, 1956. Appellants acknowledge that the material thus seized was obscene within the meaning of the statute.

They allege that their apprehension was unlawful because the arresting agents had no personal knowledge other than hearsay of the transportation of the obscene material in interstate commerce and that hearsay information however reliable cannot be the basis of probable cause to sign a complaint or for their arrest by agents of the FBI without a complaint and warrant.

The arrest of the appellants and the seizure of the evidence is alleged to have been in violation of their rights under the Fourth and Fifth Amendments to the Constitution of the United States.

The events leading to the arrest may be summarized as follows: Weise was known to agents of the FBI to be a dealer in pornography. He had previously been prosecuted for offenses involving obscene materials. He had been under investigation by the FBI

for interstate transportaion of such materials for a considerable period of time.

On March 15, 1956, while under surveillance established by the FBI, the appellants left Los Angeles, California in a Buick automobile belonging to Weise, the back end of which was observed by the agents to be loaded in excess of normal baggage. Under continuous surveillance appellants arrived in San Francisco later on the same day. After arrival at San Francisco, Weise was known to have advised an informant that he had in his possession packages of pornographic photographs for sale. On the following day the appellants were observed to make calls at several novelty houses in San Francisco known to deal in obscene material. On each occasion packages were removed from the car and delivered to the place of call. Later on the same day, Weise and French were observed by FBI agents conducting similar operations in Oakland and Sacramento, California. On the following day they arrived at Portland, Oregon, where they were also under continuous observation by agents of the FBI. They were observed taking packages from their car to two places known to deal in pornographic materials in that city. As they left Portland, on the evening of March 17, and proceeded into the State of Washington they were under continuous surveillance until the time of their arrest on arrival at Tacoma.

In the meantime, Special Agent Charles N. Hiner, having been briefed and advised through FBI channels, of the aforestated activities of the appellants, was directed to file a complaint charging them with interstate transportation of obscene material in violation of 18 U.S.C. 1465. The complaint was lodged by Hiner before Commissioner Burns in Seattle, Washington, on March 17, 1956, and prior to the time of the arrest. Simultaneously, F. Willard Ralston, the Senior Resident Agent of the FBI Tacoma office, was advised that the complaint and warrant had been issued. He was also thoroughly briefed in a 45 minute telephone conversation of the appellants' activities by the agent coordinating the investigation in Seattle, Washington. He was directed to undertake surveillance of Weise and French as they proceeded toward Tacoma. Accordingly, Ralston and three other agents under his direction proceeded to Olympia, Washington, where they undertook surveillance of the car and its occupants between that city and Tacoma. As appellants passed through Olympia, Ralston was able to observe that their car was heavily loaded and that the area behind the front seat was loaded with cardboard boxes. As the car proceeded through Tacoma on Center Street it was stopped by Ralston and his crew. Appellants were arrested and the contents of the car were seized as an incident of the arrest.

The material contained in the car consisted of some 60,000 photographs packed in the cartons previously observed by Ralston. Of this number, more than 9,000 were plainly and admittedly obscene. In addition to the photographs, there were a number of salacious books, pornographic "dildoes" or figurines and a quantity of contraceptives, together with so-called loops of obscene moving picture film.

QUESTIONS PRESENTED

1. Did Special Agent Charles N. Hiner have probable cause to file a complaint charging the appellants with violation of 18 U.S.C. 1465?

2. Did the arresting agents of the Federal Bureau of Investigation at Tacoma, Washington have probable cause to arrest the appellants for violation of 18 U.S.C. 1465?

ARGUMENT AND AUTHORITIES

The appellee takes the position that the Fourth Amendment of the Constitution of the United States is not applicable to the arrest and seizure of evidence under the circumstances involved in the instant case, that the complaint filed by Agent Hiner was valid, as was the warrant issued thereon, and finally that the arrest of the appellants and seizure of the pornographic material in their car would have been lawful

under the circumstances if the complaint had not been filed and no warrant had issued.

A. The Fourth Amendment of the Constitution

The Fourth Amendment of the Constitution is primarily concerned with unreasonable search and seizure and attendant invasion of the privacy of the individual citizen. It is intended to protect the citizen's right to be free from unlawful invasion of such privacy by the agents of the Government.

The warrants condemned by the Amendment are search warrants and not warrants of arrest. The warrant described in the Fourth Amendment shall issue "particularly describing the place to be searched and the person or things to be seized." The use of the disjunctive word "or" clearly indicates that only search warrants are the concern of the Amendment.

Thus, in *Nueslein* v. *District of Columbia* (C.A. D.C. 1940), 115 F. 2d 690, the court held that officers had no right to enter a man's house with or without a search warrant merely for the purpose of investigation or to gather evidence. In *Gouled* v. *United States*, 255 U.S. 298, at 309, the Supreme Court of the United States, after discussing the purpose of the Fourth Amendment and its own prior considerations, concluded with respect to search warrants:

> "They may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal proceeding."

Boyd v. *United States*, 116 U.S. 616; *Weeks* v. *United States*, 232 U.S. 383; and *Marron* v. *United States*, 275 U.S. 192, at pp. 195-196.

In the instant cause we are not concerned with an arrest following an illegal search in violation of the Fourth Amendment. The arrest by officers believing they had probable cause came first. Apprehension of the appellants was the essence of their act. The search of the automobile occupied by them followed as an incident to the arrest.

The Court in the *Weeks* case went out of its way to make this distinction at page 392. In discussing what the *Weeks* case "is not", the Court wrote the following:

> "It is not an assertion of the right on the part of the Government always recognized under English or American law to search the person of the accused when legally arrested to discover and seize the fruits or evidences of the crime."

We therefore contend that the Fourth Amendment is involved in the instant case only if the arrest was unlawful because of lack of probable cause to obtain the warrant or to arrest without warrant.

Cases cited by the appellant are not authority to the contrary. The *Weeks* case has previously been discussed. The *Olmstead* case does not appear significant to us as it relates to tapping of outside telephone lines, in order to obtain evidence prior to arrest. This activity, the Court held, was not a violation of the Fourth Amendment. *U. S.* v. *Tureaud* deals with a sworn information, a proceeding no longer used. The decision is more than 70 years old and has been superseded by decisions of the Supreme Court discussed later in this brief and the Federal Rules of Criminal Procedure relating to complaints. Likewise, the McCunn decision of 1930 has been modified by adoption of Rule 3, Federal Rules of Criminal Procedure.

U. S. v. *Grau*, 287 U.S. 124 again involves a search warrant. Search of dwellings was authorized by the National Prohibition Act only when they were used for unlawful sale. The warrant in question was based on information of manufacturing rather than sale and therefore was invalid in the opinion of the Court.

The Court on page 128 declared that a search warrant may issue only on evidence which would be competent in the trial of the offense before a jury.

It is interesting to note the reference to this declaration set forth in *Brinegar* v. *U. S.*, 338 U.S., 160 at page 174:

> "For this proposition there was no authority in the decisions of this Court. It was stated in a case which the evidence adduced to prove probable cause was not incompetent, but was insufficient, to support the inference necessary to the existence of probable cause. The statement has not been repeated by this Court."

Clearly the Fourth Amendment is no bar to the Complaint as filed and the warrant as issued in the instant cause.

The real question is whether the warrant and the arrest were validly executed with probable cause. We believe that the complaint was filed and the warrant issued lawfully and that the arrest was lawfully executed had there been no complaint and warrant.

B. The Complaint and Warrant

The complaint was filed under oath by Agent Hiner of the FBI, substantially in the language of the statute. It specified the operative facts on which the charge is based, including the place and date of the offense, the identity of the defendants and a description of the material alleged to be obscene. Insofar as language is concerned, there has been a literal compliance to the Fourth Amendment if that amendment is a factor as to the filing of the complaint.

The complaint is also in compliance with Rule 3 of Federal Rules of Criminal Procedure in that it is

a written statement under oath of the facts constituting the charge. *U. S.* v. *Walker* (C.A. N.Y. 1952), 197 F. 2d 287; cert. den. 344 U.S. 877. If the complaint is unlawful it could be only for the reason that Agent Hiner's personal knowledge of the operative facts was limited to information obtained by FBI agents throughout California, Oregon and Washington and relayed to him through FBI channels.

We submit that the information so obtained in this case was more than adequate to establish probable cause in the mind of any reasonable person.

In *U. S.* v. *Ruroede*, 220 Fed. 210 (D.C. N.Y. 1914), the judge construed a complaint where it was flatly stated: "The source of the deponent's information . . . as to the facts herein are based on an official investigation which can not be disclosed at this time." Yet Judge Hand found nothing wrong in this method of charging. He based his habeas corpus on the fact that no *facts* were alleged which if true would have constituted a crime.

In *Brinegar* v. *U. S.*, *supra*, at page 175, the Court in discussing probable cause adopted the definition set forth in *McCarthy* v. *DeArmit*, 99 Pa. St. 63: "The substance of all definitions of probable cause is a reasonable ground for belief of guilt, and this means less than evidence which would justify condemnation. The

rule of probable . . . cause is a practical non-technical conception. Requesting more would unduly hamper law enforcement . . ."

In *Carroll* v. *U. S.*, 267 U.S. 132 at page 161, the Supreme Court quotes with approval the following language of Chief Justice Shaw in *Commonweath* v. *Corey*, 12 Cush. 246: "If a constable or other peace officer arrests a person without warrant, he is not bound to show in his justification a felony actually committed to render the arrest lawful, but if he suspects one on his own knowledge of facts, or on facts communicated to him by others, and thereupon he has a reasonable ground to believe that the accused has been guilty of a felony, the arrest is not unlawful."

In *U. S.* v. *Bianco* (C.A. 3, 1951), 189 F. 2d, 716, the Third Circuit applied the same reasoning to the operation of the FBI. "The size and character of the FBI, however, are alone enough to suggest that it must have been supposed that agents . . . would rely on the summary conclusions of their fellow agents. To require full inter-office reports in a large organization that must act quickly would plainly hamstring its functioning." To hold to the contrary would mean that a warrant could never issue in a traveling violation of the sort involved in the instant case unless the agents from various points in California and Oregon had been flown to Seattle to make their personal oaths before

Commissioner Burns. This, we submit, would be an unreasonable requirement of the law.

In the very recent case of *Costello* v. *U. S.*, 350 U.S. at 359, the Supreme Court sustained the validity of an indictment based solely on hearsay evidence, holding that it was not in violation of the Fifth Amendment requirement of presentment to the Grand Jury.

Certainly, in view of the information provided Agent Hiner by his fellow agents, he had reasonable ground to believe that the accused appellants had been guilty of a felony.

C. The Arrest Was Valid Without Warrant

We first contend that if the warrant is valid, it is not necessary that it be in the hands of the arresting agent. *Bartlett* v. *U. S.* (C.C.A. 5, 1956), 232 F. 2d 135. It has also been established that an arrest by an officer pursuant to an unlawful warrant is a valid arrest if in fact the officer had probable cause to arrest without the warrant. *U. S.* v. *Gowan* (C.C.A. 2, 1930), 40 F. 2d 593.

With respect to arrest without warrant, the Supreme Court in *Carroll* v. *U. S.*, 267, U.S. 132 at 149, has stated: ". . . the true rule is that if the search and seizure without warrant are made upon probable cause, that is, upon a belief reasonably arising out of

circumstances known to an officer, that an automobile . . . contains that which by law is subject to seizure and destruction, a search and seizure are valid."

The pornographic pictures in question being subject to seizure and destruction (18 U.S.C. 1465), the case is clearly in point.

The Ninth Circuit has held squarely: ". . . if the arrest was lawful, the officers had a right as an incident to the arrest to search the cars in which the appellants were seated." *Sugarman* v. *U. S.* (C.C.A. 9, 1929), 35 F. 2d, 663 at 665.

Special Agent Ralston was obliged under 18 U.S.C. 3052, to ". . . make arrests without warrant of any . . . felony . . . if . . . he have reasonable grounds to believe that the person to be arrested has committed or is committing such felony."

At the time of arrest he had been fully briefed concerning the activities of the appellants as they were observed by a number of FBI agents from March 15, 1956 to the moment of arrest. He knew that Weise was a dealer in pornography, that the appellants had made deliveries of packaged materials to dealers of pornography in San Francisco, Oakland and Portland, that their car was loaded with cardboard cartons. These he had observed personally in appellants' car before arrest. He knew that Weise had stated that he had

"the real thing" with him. He also knew that Weise had previously sold pornography to dealers in Seattle and that he was headed for Seattle.

If the validity of arrest without warrant must be construed in accordance with state law, the element of probable cause on the part of Agent Ralston has been more than adequately established under the law of Washington.

In *Eberhart* v. *Murphy*, 113 Wash. 449 (1920), arrest without warrant was sustained by information contained in a letter from a prosecuting attorney reciting his opinion that the defendant was guilty of grand larceny.

In *State* v. *Thornton*, 137 Wash. 495, where officers had information from officers of another county that the defendant had delivered liquor in violation of the law, the validity of the arrest was sustained. In *State* v. *Bantam*, 163 Wash. 598, a motion to suppress was denied when the officer had an anonymous tip by telephone which described the appellant by name and appearance and gave the description of his automobile. The tip was subsequently confirmed by the time of his arrival at the place of arrest and also the appearance of the automobile.

CONCLUSION

We take the position that the obscene material entered in evidence in this cause was seized and obtained by agents of the Federal Bureau of Investigation incident to the valid arrest of the appellants herein. We, therefore, respectfully submit that the ruling of the trial court in this cause should be affirmed.

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